STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 264826 Wayne Circuit Court
DAVID ANTHONY EDWARDS, Defendant-Appellant.	LC No. 05-001738-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant first argues that he was denied his constitutional right of confrontation by the admission of Julian Brooks' plea testimony. We disagree. Generally, claims of constitutional error are reviewed de novo on appeal. *People v Geno*, 261 Mich App 624, 630; 683 NW2d 687 (2004). A trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Under the Confrontation Clause, a defendant is "guaranteed a reasonable opportunity to test the truth of a witness' testimony." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Furthermore, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, *supra* at 59 n 9, citing *California v Green*, 399 US 149, 162; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

Out-of-court statements offered for the truth of the matter asserted are generally inadmissible unless they fall within an exception to the hearsay rule; however, certain out-of-court statements are admissible as non-hearsay. MRE 801(d); MRE 802. Prior inconsistent statements made under oath and subject to the penalty of perjury are not hearsay and can properly be used as substantive evidence. MRE 801(d)(1)(A); *People v Malone*, 445 Mich 369, 378-379; 518 NW2d 418 (1994).

Before defendant's trial, Brooks testified under oath at his plea hearing regarding defendant's participation in the shooting death of the victim, Eric Clark. Further, the record reveals that Brooks reneged on his plea testimony at defendant's trial and testified that he was lying when he stated that he was at the scene of the shooting. "Inconsistency" under MRE 801(d) includes evasive answers, inability to recall and changes of position. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), vacated in part on other grounds, *People v Cleveland Williams*, 475 Mich 245; 716 NW2d 208 (2006). Brooks' testimony was given at a prior proceeding under oath subject to the penalty of perjury and it directly contradicted statements made at trial. Defendant had an opportunity to cross-examine Brooks regarding his prior statements. Thus, as defendant concedes on appeal, Brooks' prior testimony was admissible as substantive evidence.

Furthermore, defendant has failed to establish that he was denied his constitutional right of confrontation. First, Brooks was present at trial and subject to cross-examination by defendant regarding his plea testimony. The Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, *supra* at 59 n 9. Additionally, defendant erroneously relies on the "indicia of reliability" test set forth in *Ohio v Roberts*, 448 US 56; 65 L Ed 2d 597; 100 S Ct 2531 (1980), to support his argument that the admission of Brooks' prior testimony denied him the right of confrontation. However, the United States Supreme Court explicitly overruled the indicia of reliability test set forth in *Roberts*. See *Crawford*, *supra* at 66. Moreover, this Court has specifically held that "with respect to 'testimonial evidence,' *Crawford* has overruled the holding of [*Roberts*, *supra* at 56]." *Geno*, *supra* at 630-631. Accordingly, we conclude that defendant's argument is without merit.

Defendant next argues that the prosecution presented insufficient evidence to support his conviction for felony murder. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted).

The lower court record indicates that the predicate felony for defendant's felony-firearm conviction was larceny. The elements of felony murder that the prosecutor was required to prove beyond a reasonable doubt were that defendant "(1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony [enumerated in MCL 750.316(1)(b)]." *People v Bulls*, 262 Mich App 618, 624-625; 687 NW2d 159 (2004), citing *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003) and *People v Carines*, 460 Mich 750, 755; 597 NW2d 130 (1999). "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*.

Larceny and attempted larceny are among the enumerated felonies in MCL 750.316(1)(b). See *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001), aff'd in part and mod on other grounds 468 Mich 233 (2003). Larceny is the actual or constructive taking of another person's goods or property, carrying them away, with a felonious intent, and without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). An attempt consists of (1) an attempt to commit an offense prohibited by law, and (2) any act toward the commission of the intended offense. MCL 750.92; *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Here, the evidence shows that defendant and Clark had engaged in prior narcotics deals. Defendant's statements to police reveal that he first approached Clark early in the day on December 30, 2004, and, while using a gun, unsuccessfully tried to take Clark's money and drugs. Further, during his first encounter with Clark, he shot out the tires on the driver's side of Clark's pickup truck. Brooks' testimony indicates that defendant later came to his house and asked him if he wanted "to hit a lick" or rob Clark. Further, defendant told Brooks that he knew that Clark was in possession of a large sum of cash and approximately two ounces of cocaine. The record shows that defendant and Brooks then met Morris Howard at the entryway to the alley where Clark was attempting to change a tire. When there, the three surveyed the scene to determine the best way to rob Clark. Defendant's statement indicates that, initially, he did not want to use a gun to rob Clark. However, defendant changed his mind and gave the gun to Howard. In Brooks' statement to police, he identified defendant's gun as a .32 caliber revolver with a long barrel. We note that malice may be inferred from the use of a deadly weapon. *Carines*, *supra* at 758-759. A defendant need not actually "use" a weapon; when a defendant "helps" an accomplice use a weapon during the perpetration of the underlying felony a jury may properly infer malice. See *Bulls*, *supra* at 627.

Further, the record shows that, as Howard and Brooks approached Clark, defendant remained at the end of the alley as a "lookout." According to Brooks' testimony, Howard approached Clark, pointed the gun at him and ordered him to give him the drugs and the money. When Clark refused Howard's directive, he shot him twice as Clark attempted to run away. Testimony from Thomas Brinker, who was talking with Clark on his cell phone immediately before the shooting, was consistent with Brooks' version of events. Specifically, Brinker heard a "ruffling" sound, heard Clark speaking with other individuals and then heard two or three gunshots. Brooks' testimony indicates that Howard gave him the handgun after the shooting and that Brooks stood over Clark asking him if he was "okay." Defendant then approached Brooks and ordered him to leave. Brooks then gave defendant the handgun and the two fled the scene. An autopsy revealed that Clark suffered two bullet wounds to his back and that a bullet fragment and a bullet were removed from his back. Subsequent analysis revealed that the bullet was a .32 caliber metal jacket hollow point and that both the hollow point bullet and the bullet fragment were fired from the same gun. Viewing the foregoing evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to support defendant's conviction for felony murder.

Defendant next argues that his convictions for felony murder and assault with intent to rob while armed violate the state and federal constitutional prohibitions against double jeopardy. We disagree. Because defendant failed to preserve this issue below, we review for plain error affecting defendant's substantial rights. See *Carines*, *supra* at 763-764.

Pursuant to both the United States and Michigan Constitutions, the state may not place a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004) (citations omitted). However, this Court has held that "'[t]here is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.'" *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), quoting *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

Here, defendant was charged with felony murder, with the predicate felony as larceny, and assault with intent to rob while armed. "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). In order to prove the intent to rob element, the prosecution must show that at the time of the assault, the defendant intended to permanently take money or property from the victim; it is not necessary for the defendant to actually take any money or property from the victim. *People v Garcia*, 448 Mich 442, 482; 531 NW2d 683 (1995).

A review of defendant's statements indicates that defendant admitted that he intended to rob Clark of drugs and money early in the day on December 30, 2004. Additionally, defendant admitted that he was armed at that time and that he fired up into the air and toward Clark's vehicle. Therefore, sufficient evidence existed for the jury to conclude that defendant committed an assault with intent to rob while armed. Further, as discussed above, sufficient evidence existed for the jury to conclude that defendant was guilty of felony murder, including the underlying felony of attempted larceny, based on the events that occurred at 2:00 p.m. on December 30, 2004. Accordingly, the record evidence establishes that the assault with the intent to rob while armed was completed before the felony murder occurred. *Colon*, *supra* at 63. Moreover, because the felony murder conviction was based on attempted larceny and defendant was not convicted of the same, it is axiomatic that defendant was not convicted of both felony murder and its predicate felony. See *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). Therefore, defendant's convictions do not violate the constitutional prohibitions against double jeopardy and defendant has failed to establish plain error affecting substantial rights.

Defendant next argues that the trial court erred in refusing to grant his motion to suppress certain inculpatory statements that he made to police while he was in custody because they were made involuntarily. We disagree. The trial court's ultimate decision on a motion to suppress is reviewed de novo on appeal. *Akins*, *supra* at 563. However, this Court will not disturb a trial court's factual findings with respect to a *Walker*[1] hearing unless those findings are clearly erroneous. *Akins*, *supra* at 563-564, citing *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

152 (2000). A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made, giving due deference to the trial court's superior ability to determine credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *Daoud*, *supra* at 632-633. "Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996), and *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). A trial court should consider a non-exclusive list of factors in determining whether a statement is voluntary:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*.]

"[T]he prosecution has the burden of establishing a valid waiver by a preponderance of the evidence." *Daoud*, *supra* at 634, citing *Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986). When considering whether a statement was voluntary, a court should focus on the conduct of police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

A review of the evidence offered at defendant's *Walker* hearing shows that defendant made three statements over a two-day period from January 4, 2005, to January 5, 2005. Before all three interviews, defendant initialed and signed the advice of rights form, appeared to understand his rights, indicated that he waived his rights and readily agreed to make a statement to police and answer their questions. At the time of his arrest, defendant was 19 years old and had prior experience with the criminal justice system, including reading and signing the constitutional rights form on more than one occasion. Defendant had some formal education, including a GED, and appeared to the trial court to be intelligent. The interrogating officers testified that defendant never requested an attorney during the three interviews. Further, there is no evidence to suggest that defendant made his admissions because he was deprived of physical necessities or because he was subjected to threats or physical abuse.

Notwithstanding the foregoing evidence, defendant argues that his statements were induced by promises of leniency from the interrogating officers and that these promises rendered his subsequent statements involuntary. Our review of the record shows that Sergeant Odell Godbold told defendant that he would not be charged with the attempted robbery of Clark if

defendant told him the name of the person that supplied him with the handgun and the name of any of the other individuals involved in Clark's shooting. Testimony at the *Walker* hearing shows that defendant was cooperating with police officers in an attempt to secure for himself a favorable outcome to the criminal charges he faced. Nothing in the record indicates that there were any actions on the part of any police officer that would cause defendant to believe he could not voluntarily cease cooperating with the investigation. Further, there is no showing in the record that defendant made his statements during his second and third interviews based on promises of leniency. The trial court found that defendant was "trying to . . . manipulate these officers in trying to get himself out of [the charges]" and that "he voluntarily gave the statement[s]." This Court generally defers "to the trial court's superior ability to view the evidence and witnesses and will not disturb its factual findings unless they are clearly erroneous." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). Viewing the totality of the circumstances, including the police conduct during the three interviews, we conclude that the trial court properly concluded that defendant's statements were voluntary. Accordingly, the trial court did not err in admitting defendant's statements at trial.

Defendant next argues that he was denied his right to a fair trial by the prosecution's failure to produce Arlene Johnson at trial and that the trial court denied him his right of confrontation by allowing Investigator Frazier Adams to testify regarding her identification of defendant as a potential suspect. We disagree. Because defendant has not preserved this issue, we review for plain error affecting defendant's substantial rights. See *Carines, supra* at 763.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Pursuant to MCL 767.40a, a prosecutor is not under an affirmative duty to call all listed res gestae witnesses at trial. See *People v Koonce*, 466 Mich 515, 517-520; 648 NW2d 153 (2002). Thus, contrary to defendant's argument on appeal, the prosecution was not required to call Johnson at trial. Furthermore, defendant never objected to the challenged testimony or requested a due diligence hearing regarding why Johnson was not produced at trial. A review of defendant's statement to Adams on January 5, 2005, shows that defendant was aware of Johnson's presence at the shooting. Therefore, we conclude that the prosecutor's actions did not deny defendant a fair trial.

Moreover, even assuming that it was error for the trial court to allow Adams to refer to Johnson's identification of defendant, defendant has failed to show how the challenged testimony affected the outcome of the proceedings in light of his own statement and the overwhelming evidence against him. See *Carines, supra*. Thus, we conclude that defendant is not entitled to relief on appeal.

Finally, in the questions presented section of his Standard Four brief on appeal, defendant argues that he was denied the right to the effective assistance of counsel. A review of the body of the brief shows that defendant does not make any argument to support his assertion that he was denied the right to the effective assistance of counsel. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position . . . . Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373,

389; 639 NW2d 291 (2001) (citations and internal quotations omitted.) Accordingly, we conclude that defendant has abandoned appellate review of the issue.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette